IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

WRIT PETITION NO. 876 OF 2003

Prabhuta Augustus Villa
Cooperative Housing Society
Limited, a Cooperative Housing
Society registered as per the
provisions of the M.C.S. Act, 1960
under Reg. No. BOM/DW/HSG/TC/5846/
1990-91 and operating from 21,
Hughes Road, (N.S. Patkar Marg,
Mumbai 400 007. ... Petitioner

Vs.

1. Rushabh Medicals PVt. Ltd.
a private company limited by
shares incorporated under the
Companies Act, 1956 operating
at or from Flat No. 1, at
Ground Floor, Augustus Villa,
Building of Prabhuta Augustus
Villa Cooperative Housing
Society Limited, 21, Hughes Road,
(N.S. patkar) Marg,
Mumbai 400 007.

2. Divisional Joint Registrar,
Cooperative Societies, Mumbai
Division, having his office at
Malhotra House, 6th Floor,
Opp. G.P.O. Fort, Mumbai 400 001. ... Respondents

Mr. A.A. Bookwala with Mr. M.M. Desai i/by Desai & Desai for Petitioner.

Mr. N.V. Walawalkar with Mr. S.S. Desai &: Mr. A.R. Patil i/by Purnanand & Co. for Respondent No. 1.

Ms. S. Shreedharan, A.G.P. for Respondent No.2.

CORAM : F.I. REBELLO,J.
DATED : DECEMBER 01, 2004

ORAL JUDGMENT :

1. The Petitioner is cooperative society registered under the provisions of the Maharashtra Cooperative Societies Act, 1960. The members of the Petitioner Cooperative Society were earlier

tenants of two buildings known as Prabhuta & Agustus Villa respectively. The Petitioner society acquired the said building under registered deed of assignment from its pervious owners. Respondent No. 1 is a private limited company which was also a tenant of one of the premises in Augustus villa occupying Flat No. 1 on the ground floor. It is the case of the Petitioner that Respondent No.1 though initially had given his contribution to join as founder member, subsequently withdrew his contribution. Subsequent to the society being registered and the property been assigned in favour of the petitioner society, the original owners/landlrod by letter dated 17.12.1993 intimated to Respondent No. 1 attorning tenancy in favour of the Petitioners. By letter of 15.2.1994, respondent No. 1 addressed a letter to the Petitioners acknowledging the receipt of the bill towards rent for the month of January and February, 1994 and forwarded the cheque for the said amount. The Respondent thereafter was paying rent continuously. By letter of 7.5.2001 the respondent No. 1 wrote to the Secretary of the Petitioners setting out that they were willing to pay the amount for converting the status from tenant to member of Petitioner as per the area utilised by them. An application was made by Respondents No. 1 to the Petitioners on 7.5.2001 for being admitted as member of the Petitioners. Office bearers of the Petitioner society by letter of 1.8.2001

intimated Respondent No. 1 that the application for membership dated 7.5.2001 was put up before the Special General body meeting convened on 20.7.2001 and after considering the facts and circumstances of the case, the general body has resolved to refuse membership. A copy of the resolution was also forwarded to the Respondent No. 1.

2. The Respondent No. 1 thereafter preferred an appeal before the Deputy Registrar. One of the contentions raised was that the Chief Promoter had given undertaking while registering the society that the remaining tenants will be admitted. The Respondent No. 1 further set out that the tenants had come together and formed a housing society and that Respondent No.1 was never invited to become a member at that time or even subsequently. Respondent No. 1 it was contended had never refused to become member of the society. Reply was filed on behalf of the petitioners. It was set out therein that the Respondent No. 1 was tenant in Augustus Villa. The tenants decided to buy the said property by forming a cooperative Society and all the tenants were asked to contribute some amounts. Accordingly along with other tenants Respondent No.1 had given his contribution vide his cheque No. 821997 drawn on Bank of India which cheque was encashed by the proposed society on 11.1.1991. After a month or so respondent No. 1 informed that they did not desire to join the

proposed society and demanded the refund of his contribution. The proposed society by cheque No. 971256 dated 18.2.1991 drawn on Dena Bank refunded the applicant's contribution which cheque was encashed on 5.3.1991 by Respondent No. 1. Reference was then made to the agreement of sale dated 27.3.1991. It was then set out that the Respondent No. 1 had advertised for sale of one building i.e. Augustus Villa in the newspaper Times of India dated 26.11.1996. Reference is then made to the application made by Respondent No. 1 for being admitted as member and to the subsequent resolution of the petitioners rejecting application of Respondent No. 1 of being admitted as member. It was also pleaded that this court had occasion to consider and decide such an issue and reference was made to the case of Shree Jaya Mahal Co-operative Housing Society Ltd. Vs. M/s. Zenith Chemical Works Pvt. Ltd. and Ors. 1991 (3) Bom.C.R. 201.

3. The Deputy Registrar before whom the appeal was preferred by order of 23.1.2002 was pleased to allow the appeal and directed the petitioners to admit Respondent No.1 as member of the Petitioner No. 1. The Respondent No. 1 was further directed to pay the cost of the premises to respondent which was contributed by members of the petitioners at the time of formation of the society with interest at the rate of 12% p.a. from the date of formation of the society till date of the order. The learned

Deputy Registrar in Paragraph 8 observed that while registering the society, the Chief Promoter had given certain affidavit and undertakings and that the society was registered on the basis of information, affidavit and undertaking Under Section 9 of the M.C.P. Act, 1960 and that the Petitioners herein has adopted the model bye-laws. A further finding was recorded that it is admitted position that the appellant was not invited to join the membership of the society when society was formed. It was then observed that it is matter of record that the appellant initially showed intention of becoming member and had paid Rs.5,000/- to the Chief Promoter and that the said amount was returned to the respondent by the petitioners herein. Further findings was recorded that the amount so returned by the Chief Promoter to Respondent No. 1 was without any demand and Respondent No. 1 was then never invited to become member of the Society. The learend authority then held that the reasons given for refusal of membership was improper and illegal and cannot stand the test of law. After rejecting the contention regarding nuisance held that on admission as member, Respondent No. 1 could be put to terms.

4. The Petitioners aggrieved preferred revision before the second Respondent. The second respondent by the impugned order dated 29.10.2002

was pleased to dismiss the revision preferred by the Petitioner herein. The second respondent also noted that the Petitioners while registering themselves had given certain undertakings and the society was registered on the basis of those undertakings. The Petitioners were trying to flout those undertakings by refusing membership to the Respondent No. 1. The second respondent also noted that the Petitioners had clearly stated in registration proposal that all the tenants are entitled to be the members and they will admit them as a Member. If such statement was made, the petitioners would not be permitted to go back on their own statement and thus, found no merit in the revision Application. The judgment in the case of Jaya Mahal (supra) was distinguished for the grounds set out in Paragraph 10 of the order. It is this order also which is subject matter of the present petition along with a consequential order.

5. At the hearing of this petition, on behalf of the Petitioners, it is submitted by the learned counsel that the orders of Deputy Registrar i.e. second Respondent, disclose an error of law apparent on the face of record and or are without jurisdiction. It is submitted that Respondent No. 1 had initially contributed for becoming a member of the petitioners but thereafter had withdrawn his amount and for 10 years his status was that of tenant of petitioner society. It is pointed out

that there is no provision in the bye laws or any other legal requirement where the tenant can be admitted to the membership of the society. It is submitted that such issue was in issue before this court in Shree Jaya Mahal (supra). A learned Single Judge on similar facts had held that the tenant who chose not to become member at the time the Society was formed and subsequently after a lapse of time applied for being admitted as member

was not entitled to be admitted as a member.

. On the other hand on behalf of the Respondent No. 1 their learned counsel submits that this court in exercise of its extra ordinary jurisdiction ought not to interfere with the well reasoned orders and discretion exercised by the courts below. It is further submitted that the petitioners themselves had given undertaking at the time of registering the society that they would admit tenants as members and consequently they cannot now deny membership to the Respondent No. 1. This aspect it is set out was considered by the tribunals below and for this reason also the court should not interfere in the exercise of its extra ordinary jurisdiction. Lastly it is submitted that the Petitioners herein submitted false information to the Registrar under the Act in registering the society. Whereas there were 17 members in the affidavit at the time of registration, the Chief Promoter only disclosed that there were 16 tenants.

A party which has given false information, it is submitted ought not to be heard by this court. It is therefore, submitted that the petition be dismissed. Reliance was also placed on the judgement of the Division Bench of this court in S Paygonda Surgonda Patil and Others Vs. Jingonda Surgonda Patil and Others, AIR 1968 Bombay 198 to contend that this court should not interfere with the order of the Lower Court however wrong it may be in law unless it is necessary to do so in the interest of justice. After hearing was concluded and the matter reserved for judgment, some other judgments have also been submitted. In my opinion, those judgements do not deal with the issue in issue herein and consequently need not be adverted to.

6. Having heard learned counsel the first question really is whether it was open to the Deputy Registrar and Registrar to direct admission of Respondent No. 1 as member to the Petitioner society. There is nothing in the bye laws or for that matter nothing has been brought to the notice of this court under the Act or Rules whereby a tenant or Respondent No. 1 is entitled to be admitted as member of the Petitioners. The application for membership by Respondent No. 1 was on the basis that he also was tenant when the society was proposed to be formed and he was kept out of membership by not inviting or for that

matter being asked to join as member. There is no dispute and there can not be that the Respondent No. 1 had also brought in his contribution of Rs.5,000/- when it was proposed to form the society. There is also no dispute that the said amount was returned back to Respondent No. 1 and that Respondent No. 1 accepted the cheque and encashed it. The question is whether the findings recorded by the Deputy Registrar and or second Respondent that the money was returned by the Chief Promoter and that Respondent No. 1 was not given opportunity of being admitted as member is supported by the record. The letter of 17.12.1993 by the owners to Respondent No. 1 intimating the atornment of the tenancy in favour of the society would make it clear that the owners have intimated the Respondent No. 1 that the Society had been formed and that rights in the property had been assigned/conveyed by them to the said society. The letter of 15.2.1994 would indicate that Respondent No. 1 accepted and or had knowledge that the society had been registered and agreed to pay the rental dues. There is a contemporaneous document i.e. indenture of 7.12.1993 in which a list of tenants who had joined the society and the list of tenants who had not joined has been set out. Only the name of Respondnet No. 1 is shown as the tenant who had jot joined the society. Even application for registration, which is annexed with affidavit of Respondent No. 1 shows that 16 of the

tenants had signed as promoters. It was only Respondent No. 1 who was not party. Similarly the name of 16 promoters along with premises occupied by them, areas in sq. ft. forms part of the annexure. The affidavit filed by the Chief Promoter sets out that he has obtained application for membership from all the intending members. In Para 4 of the affidavit it is set out that all the tenants except one have joined the society. If this documentary evidence is considered and the fact that the Respondent No. 1 had paid his contribution initially of Rs.5,000/- which was subsequently withdrawn, it would be clear that the stand of Respondent No. 1 that he had never been invited to be admitted as member must fail. Once that the case, the onus was on Respondent No. 1 to show that he was deliberately kept out from being admitted as member. That onus was not discharged by leading any evidence. The findings, therefore, by the deputy Registrar as also Joint Registrar that the Respondent No. 1 was never informed or being allowed to join as member in my opinion is totally perverse. It is true that this court normally in exercise of its extra ordinary jurisdiction under Article 226 and 227 would not interfere with the findings of fact recorded by the tribunals below unless it is perverse. In the instant case, in my opinion, the finding being totally perverse and the order is based on that finding the order is liable to be set aside.

7. We then come to the Judgment of this court which was sought to be distinguished by Respondent No. 2. In Shree Jaya Mahal (supra) also the occupants of the building had decided to form cooperative society and acquire the membership of the building from the erstwhile owners. The respondent in that petition were also invited. Though they had orally consented, they did not take any follow up action. As respondents did not take steps to join as members, the application for registration of the society did not bear their signatures and the registration thereafter was done without the said members. Even thereafter the said occupants were asked to join as members on their paying 150 months rent. In the meantime, there were some other intervening circumstances. The said occupants then applied for being admitted as members. On refusal by the society they approached the Deputy Registrar. The Deputy Registrar and Registrar took similar view as in the present case. The learned Judge therein also noted that in the ordinary course, this court would not interfere in the extra ordinary jurisdiction unless the conclusion of the statutory authorities were based on no evidence or are a result of perversity. The learned Judge therein also found that the occupants therein did not chose to accept the offer made and that the offer was merely by way of concession and could not be kept open indefinitely.

. In the instant case also on the facts of record, it will be clear that the Respondent No. 1 was aware of the formation of the society. The Respondent No. 1 initially paid the contribution which was subsequently withdrawn. The Respondent No. 1 was thereafter fully aware that the society has been registered. On the letter of attornment being served by previous owners, Respondent No. 1 agreed to continue as tenant of the Petitioners without protesting or demanding that he also be admitted as a member. If it was his genuine case of Respondent No. 1 that he was not invited or informed to become a member, surely after he comes to know that the society had been registered, he would have taken steps either to protest his non-inclusion or apply to be admitted as member. He chose not to take any step but on the contrary continued to pay the rent as tenant to the society. In my opinion here also the society could not have indefinitely waited for the Respondent No. 1 to apply as member. The Respondent No. 1 as noted earlier was fully aware and had made his contribution but chose not to become member. The Deputy Registrar and the Joint Registrar have gone on the footing that the undertakings had been given that all the tenants would be admitted as members. The said undertaking would have to be read in its correct perspective and in a rational manner. That would only mean that those tenants who were willing

to join as members and not the tenants who refused to join and or kept silence thereafter for several years could apply for membership and be admitted as member. The undertakings if any cannot apply to such tenants who continued as tenants and after a long lapse of time chose to apply for membership. The reasoning followed by the authorities below to my mind for holding that there was no delay on the part of Respondent No. 1 to apply for membership is totally misconceived.

8. It was lastly submitted that the Petitioner No. 1 had given false information for the purpose of registration. Even if that be so, the Respondent No. 1 can have no grievance. If there have been some mistake committed by the Petitioners, or as alleged by Respondent No. 1 false information it would have been open to the registering authority to have drawn attention of the Petitioners to that fact. That was not done. On the contrary, from the documents on record, it is clear that there were 17 tenants out of whom 16 applied as promoters to form society. It is only Respondent No. 1 who did not join. It is only in the affidavit there seems to be some mistake showing the number of members and in my opinion that cannot be held against petitioners herein.

. For all the aforesaid reasons, the orders of the Deputy Registrar dated 23.1.2002 and the order in

Revision dated 29.10.2002 as also the consequential orders are liable to be quashed and set aside. In the light of that, rule made absolute in terms of Prayer Clauses (a) and (b). C.C. expedited.

. Personal Secretary to issue authenticated copy of this order.

(F.I. REBELLO,J.)